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No. 10-367

Supreme Court, U.S.
FILED
OCT 14 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ROLAND WALLACE BURRIS, U.S. SENATOR,

Petitioner,

v.

GERALD ANTHONY JUDGE, et al.,

Respondents.

On Petition For A Prejudgment Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF

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I. Introduction

The United States Court of Appeals for the Seventh Circuit has just issued the third in a trilogy of decisions construing the Seventeenth Amendment to require Illinois to hold a special election for President Barack Obama's Senate seat and empowering the district court to dictate the mechanics of that election.[1] Senator Roland W. Burris, who former Illinois Governor Rod Blagojevich appointed to fill the seat, has petitioned for a writ of certiorari before judgment to review a permanent injunction issued by the United States District Court for the Northern District of Illinois that prevents Senator Burris from running in the election. Senator Burris now supplements his petition because the Seventh Circuit's latest decision affirmed the district court's injunction restricting the special election to those candidates already qualified to run in the general election scheduled the same day for the next full Senate term.

It is ironic that the Seventh Circuit justifies one violation of the Seventeenth Amendment to rectify another. The framers of the Amendment clearly contemplated that any Senate vacancy filled by election would be "as the legislature may direct" – the elected body of the citizenry – rather than a single federal judge. And, as to the principal issue here,

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[1] *Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2010) ("*Judge I*"); *Judge v. Quinn*, 2010 WL 2853645 (7th Cir. July 22, 2010) (unpublished order) ("*Judge II*"); *Judge v. Burris, et. al.*, No. 10-2836 (7th Cir. September 24, 2010) ("*Judge III*").

blocking access to the ballot, the district court did not need to usurp the role of the Illinois General Assembly by defining the candidate pool as Illinois law already provides an alternative means that no party claimed is unconstitutional and, indeed, satisfied the plaintiffs who were pursuing the injunction.[2]

II. Impact of the Seventh Circuit Decision on the Petition

The district court's permanent injunction order and the Seventh Circuit's trilogy of *Judge* decisions are built upon a false dilemma – that judicial intervention is necessary to avert a constitutional crisis created by inaction on the part of the Illinois General Assembly, a body never a party to this litigation. Both courts acknowledge that the Seventeenth Amendment to the U.S. Constitution empowers the General Assembly to direct the mechanics of any election to fill a vacancy in the U.S. Senate. Yet, their decisions presume inaction where none has occurred to justify court-ordered intervention into the election process.

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[2] Plaintiffs' proposed permanent injunction order cited to an Illinois statute prescribing the candidate selection process for vacancy elections: "The Court also finds that selecting nominees by political parties to be candidates for the U.S. Senate at the special election to be held on November 2, 2010 pursuant to the vacancy provisions of 10 ILCS §5/7-61 . . . is the most appropriate manner for the selection of the nominees[.]"

Intervention was unnecessary under this Court's prior rulings in *Valenti v. Rockefeller*, 393 U.S. 405, 89 S.Ct. 689, 21 L.Ed.2d 635 (1969) and *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10-11, 102 S.Ct. 2194, 72 L.Ed.2d 628 (1982). In *Valenti*, this Court sustained the authority of the New York Governor to fill a Senate vacancy for over 29 months by appointment, permitting the appointee to serve the remainder of the term without a special election. In *Rodriguez*, the Court noted "that the Seventeenth Amendment permits a State, if it chooses, to forgo a special election in favor of a temporary appointment to the United States Senate[.]" *Rodriguez*, 457 U.S. at 11.[3]

In any event, the Seventeenth Amendment mandates that state legislatures, not the federal judiciary, prescribe the mechanics of any vacancy election: "the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election *as the legislature may direct.*" (Emphasis added.) Despite acknowledging this power of the General Assembly in *Judge I*, 612 F.3d at 554-55, the Seventh Circuit endorsed the district court's usurpation of that power in *Judge III*. The appellate court explained that

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[3] Even the Seventh Circuit itself in *Lynch v. Illinois State Board of Elections* construed *Valenti* and Rodriguez to "sustain the authority to fill vacancies in elective offices by appointment, even though the appointee will hold office for the duration of the term." 682 F.2d 93, 96 (7th Cir. 1982).

"[o]nce a constitutional violation has been proven, federal courts have the power to issue remedial orders tailored to the scope of the constitutional violation." *Judge III*, slip op. at 12. Neither the district court nor appellate court, however, has identified any constitutional violation by the General Assembly justifying the district court's interference with its Seventeenth Amendment duty to direct the special election. Instead, the Seventh Circuit presumed that Governor Quinn's failure to issue a writ of election warranted the district court's interference in the electoral process through the injunction even after the Governor issued a writ.[4]

As the events in Illinois transpired, the State of West Virginia faced a vacancy in its Senate delegation when Senator Robert Byrd died on June 28, 2010. *Within three weeks*, the West Virginia Legislature defined election procedures for a special election to coincide with Federal Election Day on November 2nd to fill the vacancy. The Special Election Bill establishes a special primary for political parties and

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[4] Under Fed.R.Civ.P. 65(d)(2), an injunction may only bind "(A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)." The district court implemented its order by serving Illinois State Board of Elections and the Illinois Secretary of State pursuant to this rule without identifying which subsection applied. Neither the Board nor Secretary of State, of course, played any role in preventing the Governor from issuing a writ of election.

allows independent candidates to run that file a petition with sufficient signatures and pay a filing fee. Unlike the district court's process here, the West Virginia Legislature thus opened the special election for the Senate vacancy to candidates not already prequalified.

Similarly, the Illinois General Assembly must first be given the opportunity to exercise its own judgment in fulfilling its constitutional responsibilities. The federal courts may only intervene after the legislature has acted or failed to act in a manner that is not consistent with the Constitution. Until then, the Constitution does not permit the preemptive judicial interference embodied in the district court's permanent injunction order and sanctioned by the appeals court.

III. Senator Burris Did Not Waive His Argument

The Seventh Circuit contends that Senator Burris waived his principal argument that the district court usurped the constitutional role of the Illinois General Assembly when it decided how candidates should be selected for the special election. *Judge III*, slip op. at 11. Traditionally, this Court will grant certiorari only when a question presented was pressed by the petitioner or passed upon by the courts below. *United States v. Williams*, 504 U.S. 36, 41, 112 S.Ct. 1735, 1738-1739, 118 L.Ed.2d 352 (1992). At the earliest practical time, Senator Burris asserted his

claim, and the district court rejected it, thus satisfying the "press or pass" requirement.

In *Judge III*, the Seventh Circuit maintained that Senator Burris only questioned the district court's power to dictate the candidates in the special election so long as he was not one of them. *Judge III*, slip op. at 11-12. This is simply not true. Immediately after remand, Senator Burris joined with Governor Quinn to question the district court's power to define the candidates for the vacancy election. In the first post-remand hearing, after plaintiffs had moved for a permanent injunction, the Governor's counsel pointed out that "we can't just override the Illinois Election Code by fiat. We can't do that. We can't just decide who goes on the election." Transcript of Proceedings of June 23, 2010 at p. 10. When he spoke, Senator Burris' counsel said, "I agree, your Honor, and on behalf of Senator Burris, we strongly support the position of the Attorney General. We think it's the appropriate position." *Id.* at p. 12. Governor Quinn's counsel then expanded on his argument, an argument that Senator Burris endorsed then and asserts now:

> *The Constitution itself says that the conduct of elections is regulated by the states . . . and maybe people in the State of Illinois want to vote for one person for the 60-day term and a different person for the six-year term. So we don't want to have a sham election where it's the same people. Who decided that by fiat,*

> *that it should be exactly the same people?* (Emphasis added.)

Id. at 25-26.

This, of course, is precisely the argument that Senator Burris advances in this petition for certiorari. For Senator Burris to continue asserting his position would have been fruitless because the Seventh Circuit soon issued *Judge II*, effectively ordering the district court to define the mechanics of the special election. *Judge II*, 2010 WL 2853645, at *1.

Afterwards, as the district court defined the mechanics of the special election in the two hearings that followed, Senator Burris did not simply promote his own interests by advocating that adding him to the ballot would satisfy the Constitution. To the contrary, at both hearings where the issue was discussed after *Judge II*, his counsel insisted that all interested candidates must be entitled to seek nomination. Indeed, until the final hearing, the district court was leaning toward a resolution that plaintiffs had earlier proposed based upon 10 ILCS §5/7-61 of the Illinois Election Code.

Four days after expressing this preference, the district court issued its permanent injunction, which ignored the Illinois statute by restricting the candidates for the vacancy election to those already qualified for the general election. Under the circumstances, Senator Burris did all that he could do to preserve his position on appeal, both as to the district court's usurpation of the legislature's constitutional

power to define the special election and the unconstitutional denial of ballot access to all candidates besides those already qualified for the general election.

More to the point, as the hearing excerpts establish, Senator Burris pressed these issues before the district court and the court passed on them when it issued an injunction that ignored the Illinois Election Code to block Senator Burris and other interested candidates from participating in the special election for the seat that the Senator now holds.

IV. Conclusion

For the foregoing reasons and those in Senator Burris' original petition, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 10-2836

GERALD A. JUDGE and
DAVID KINDLER,

Plaintiffs-Appellees,

v.

PAT QUINN, Governor of
the State of Illinois,

Defendant,

and

ROLAND W. BURRIS, U.S. Senator,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 09 C 1231 – **John F. Grady**, *Judge.*

SUBMITTED SEPTEMBER 22, 2010* –
DECIDED SEPTEMBER 24, 2010**

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* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus the appeal is submitted on the briefs and the record. FED. R. APP. P. 34(a)(2).

** This opinion is being issued in typescript; printed version to follow.

Before ROVNER, WOOD, and TINDER, *Circuit Judges*.

WOOD, *Circuit Judge*. In this appeal, Senator Roland Burris challenges a permanent injunction entered by the district court after our decision in *Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2010) ("*Judge I*"). That injunction states that the State of Illinois will hold a special election on November 2, 2010. In that election, the people of Illinois will select a permanent replacement to fill President Barack Obama's seat in the U.S. Senate for the remainder of the 111th Congress. Because November 2 is fast approaching and in the interest of a manageable election, the district court limited the candidates who will appear on the ballot for the special election to those people who are slated to appear on the November 2 ballot in the general election to fill the six-year Senate term that will begin at the start of the 112th Congress. One practical effect of this limitation was to prevent Senator Burris, who was appointed to serve as President Obama's temporary replacement in the Senate, from participating in the special election. In this appeal, Senator Burris asks us to vacate the district court's permanent injunction. We conclude that the lower court acted well within its discretion, and we affirm its order.

I

We will assume familiarity with our earlier opinion, which described the background of this case, and so we address here only the facts necessary to

resolve this successive appeal. On June 16, 2010, we affirmed the district court's decision to deny a preliminary injunction to two Illinois voters who claimed that the Seventeenth Amendment required Pat Quinn, the Governor of Illinois, to issue a writ calling for a special election to select a permanent replacement for President Obama's former seat in the Senate. *Judge I, supra.*

Our analysis of the Seventeenth Amendment led to the conclusion that a state must hold an election each time that a vacancy occurs in its Senate delegation, so that the people of the state can elect a replacement senator. To ensure that such an election takes place, the executive officer of the state is required by the Constitution to issue a writ of election. The timing and mechanics of the special election are governed by state law, as contemplated by the Elections Clause of the Constitution and the final phrase of the Seventeenth Amendment's second paragraph. Finally, the Seventeenth Amendment permits the state legislature to empower the state executive to fill a Senate vacancy temporarily by appointment, until a special election takes place. *Judge I,* 612 F.3d at 554-55. At the time of the plaintiffs' initial appeal in this case, Governor Quinn had not issued a writ of election, and the State of Illinois took the position that Senator Burris was to serve as President Obama's replacement in the Senate until January 3, 2011. They maintained this position despite the fact that then-Governor Blagojevich's certificate appointing Senator Burris made clear that his tenure in the

Senate was to last only "until the vacancy . . . is filled by election as provided by law." Accordingly, we concluded that the plaintiffs had a strong likelihood of success on the merits of their constitutional claim.

Ultimately, however, we decided that preliminary relief was not warranted because the plaintiffs failed to identify any irreparable harm that they might suffer in the absence of immediate equitable relief. We noted there was still ample time during which Governor Quinn might issue a writ of election, and we felt confident that the district court would resolve the merits of the plaintiffs' claim in a timely fashion. Because the issue was not presented in the plaintiffs' appeal, we declined to address how the state was to decide what names should appear on the ballot for the special election. We did suggest, however, that the state might propose a solution acceptable to all parties. *Judge I*, 612 F.3d at 556-57.

Following our decision, the plaintiffs asked the district court to enter a permanent injunction ordering Governor Quinn to issue a writ of election that would call for a special election on November 2, 2010, the date specified by the Illinois Election Code, 10 ILCS 5/25-8 (West 2010). On June 23, 2010, the district court held the first of five hearings to consider the plaintiffs' request. Lawyers for the plaintiffs, Governor Quinn, and Senator Burris were present. Governor Quinn opposed the injunction, saying that a second election on November 2 would cause voter confusion, that there was too little time to prepare, and that the Illinois Election Code failed to outline

any method for selecting candidates to participate. Senator Burris joined the governor's opposition. In response, the plaintiffs proposed a number of potential solutions to the purported timing and candidate-selection problems. The district court postponed its decision while Governor Quinn filed a petition in this court for rehearing.

On June 28, 2010, Governor Quinn filed his petition for rehearing and rehearing *en banc*. Among other arguments, he again asserted that it would be impossible for Illinois to prepare for a special election in compliance with the Illinois Election Code in the time remaining before November 2. The plaintiffs filed an expedited response, explaining that a November 2 special election was feasible if the state overrode the normal primary system for selecting candidates for the ballot and used a more expeditious method. We denied rehearing on July 22, at which point we amended our initial decision to make clear that

> [t]he district court has the power to order the state to take steps to bring its election procedures into compliance with rights guaranteed by the federal Constitution, even if the order requires the state to disregard provisions of state law that otherwise might ordinarily apply to cause delay or prevent action entirely. . . . To the extent that Illinois law makes compliance with a provision of the

> federal Constitution difficult or impossible, it is Illinois law that must yield.

Judge v. Quinn, 2010 WL 2853645, at *1 (7th Cir. July 22, 2010) (unpublished order) ("*Judge II*").

Four days after that order, the district court held its fourth hearing to consider the permanent injunction. Abandoning his earlier position, Governor Quinn there acknowledged that a special election was possible. This meant that all of the parties then agreed that a primary was unnecessary. Governor Quinn proposed that the court disregard the requirements of the Illinois Election Code and limit the special election ballot to candidates who had been selected in primaries (or had collected the requisite number of signatures) and were set to appear on the November 2 general election ballot for the new, six-year Senate term. That precise procedure, the parties agreed, had been used in Illinois to select candidates for a special election to the U.S. House of Representatives following our decision in *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970). *See Vote Set for House Vacancy*, Chicago Tribune, July 28, 1970, at 3. While the plaintiffs initially put forward a plan under which the central committees of the state's political parties would choose candidates for the special election, in accordance with the vacancy provisions of the Illinois Election Code, they made clear that they did not object to the governor's plan.

Senator Burris, however, was not satisfied. He opposed any plan that would leave him (or other

interested citizens, he said) off the special election ballot. He proposed that the district court enter an injunction providing that parties who collected a limited number of signatures would also be entitled to appear on the ballot for the special election. Governor Quinn urged the court to reject that idea, arguing that an entirely novel qualifying procedure would be much too complicated to implement in the short time that remained. In response, the district court asked the parties whether they would object to its ordering that Senator Burris should be included on the special election ballot by fiat. Senator Burris supported that proposal. But the plaintiffs noted that Senator Burris's appointment to the Senate did not give him a special claim to a spot on the ballot over any other citizen, and Governor Quinn added that the presence of Senator Burris on the list of special election candidates might cause confusion among voters if he was then absent from the list of general election candidates on the same ballot. As the hearing closed, the district judge asked Governor Quinn and the plaintiffs to return later that week with a draft injunction order. Senator Burris, still objecting to his potential exclusion, asked to submit a brief in opposition to any order, to which the court responded, "I don't need any briefs on this. But I will hear you fully when we have an order. . . . [D]on't be afraid that you won't have an opportunity to be heard."

On July 29, the district court held its fifth and final hearing. Governor Quinn and the plaintiffs arrived having reached agreement on the contours of

a permanent injunction order. After a discussion about how long the state would have to certify election results, the court asked Senator Burris's attorney what right Senator Burris had to be placed on the special election ballot as opposed to any other person. The attorney responded, "I don't know that Senator Burris is suggesting that there is a right outside of the right that should be afforded to any person to have ballot access. He believes that to be a constitutional right." Senator Burris also submitted a brief in opposition to the permanent injunction, in which he argued that the district court had denied him the opportunity to be heard and threatened to violate his right to access the ballot by issuing an injunction.

The district judge decided it would adopt Governor Quinn's proposal, restricting the special election ballot to those candidates slated to run in the general election. At the same time, in Springfield, Illinois, Governor Quinn issued a writ of election. He commanded the clerks in each county "to cause a SPECIAL ELECTION to permanently fill [President Obama's vacancy] for the remainder of Hon. Obama's term to be held in the STATE OF ILLINOIS on TUESDAY, NOVEMBER 2, 2010 in conformity with any applicable federal court orders and, to the extent feasible, with the Illinois Election Code. . . ."

On August 4, 2010, the district court entered its preliminary injunction order. In the order, the district court confirmed that the Illinois Election Code established November 2 as the date for a special election, and it found that the writ of election issued

by Governor Quinn complied with the federal Constitution and Illinois law. In addition, the district court noted that it had conducted five separate hearings "to consider procedures for conducting a special election on short notice," and it recognized that "to the extent that Illinois law makes compliance with a provision of the federal Constitution difficult or impossible, it is Illinois law that must yield to the extent that it otherwise might apply to cause delay or prevent action entirely." *See Judge II*. Noting that a primary election was not necessary and that candidates had to be limited to a manageable number, the court entered its order adopting Governor Quinn's candidate-selection plan. Senator Burris's appeal followed.[1]

II

We review a district court's entry of a permanent injunction for an abuse of discretion. *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 603 (7th Cir. 2007). In an election law case, "[t]he essential question . . . is whether the District Court properly

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[1] On September 3, 2010, Senator Burris filed a Motion for Stay of District Court Order and a Petition for a Writ of Mandamus in this court. Both of these represented efforts to prevent the district court's injunction from taking effect. This court denied both the motion and the petition on September 8, 2010, at which time we expedited this appeal. Senator Burris also filed an Application (No. 10A272) with Justice Breyer, in his capacity as Circuit Justice for the Seventh Circuit, seeking a stay of enforcement of the district court's judgment. On September 20, 2010, Justice Breyer denied the Application.

exercised its equitable discretion in reconciling the requirements of the Constitution with the goals of state political policy." *Connor v. Finch*, 431 U.S. 407, 414 (1977).

Senator Burris's principal contention in this appeal is that the district court lacked the power to enter a permanent injunction defining the mechanics of the November 2 special election. This argument is split into two closely related branches: first, the senator claims that the lower court's order concerns a nonjusticiable political question; and second, he asserts that the injunction invades the exclusive province of the Illinois state legislature, in violation of the Elections Clause and the Seventeenth Amendment. In addition to these arguments, Senator Burris takes the position that the permanent injunction interferes with his constitutional right of access to the ballot.

A

We begin with the political-question argument, for if this case presents an issue that falls within the scope of that doctrine, then we lack authority to adjudicate it. *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (citing *Luther v. Borden*, 7 How. 1 (1849)). Contrary to the plaintiffs' suggestion, it makes no difference whether Senator Burris raised this argument before the district court; it affects our jurisdiction and cannot be forfeited.

The political-question doctrine "identifies a class of questions that either are not amenable to judicial resolution because the relevant considerations are beyond the courts' capacity to gather and weigh, . . . or have been committed by the Constitution to the exclusive, unreviewable discretion of the executive and/or legislative – the so-called 'political' – branches of the federal government." *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior*, 255 F.3d 342, 347 (7th Cir. 2001). The Supreme Court's decision in *Baker v. Carr* sets out the now-familiar factors that, if present, suggest that a political question exists:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962). Importantly, the *Baker* Court added that "[t]he doctrine . . . is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy

as to whether some action denominated 'political' exceeds constitutional authority." *Id.* Senator Burris suggests that several of the considerations *Baker v. Carr* identified as tending to reveal a political question are present in his case. In our view, however, the only ones that require closer attention are whether there is a lack of judicially manageable standards for implementing the special election or if the conduct of that election is entirely committed to the political branches.

With respect to the first of those issues, both history and constitutional text show that this case is not one where reasonable people might disagree about the availability of judicially manageable standards. But compare *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *Davis v. Bandemer*, 478 U.S. 109 (1986). The Seventeenth Amendment supplies a concrete rule requiring an election to fill each Senate vacancy. The district court turned to state law, past practice in Illinois, and recent primary election results to establish the timing of the required special election and a fair slate of candidates to participate. Nothing that the court did in order to bring Illinois's election procedures into line with the Seventeenth Amendment was beyond its capacity.

Similarly, this case does not involve an issue committed to the exclusive discretion of one of the political branches. Senator Burris takes the view that, because the Constitution commits to the Illinois legislature the job of defining the mechanics of a vacancy election, the federal district court has no

institutional role to play. But a long line of decisions from the Supreme Court demonstrate that he is wrong. The Court has said that "[w]hen challenges to state action respecting matters of the administration of the affairs of the State and the officers through whom they are conducted have rested on claims of constitutional deprivation which are amenable to judicial correction," federal courts may act to address the merits of those claims. *Baker*, 369 U.S. at 229 (internal quotation marks and footnote omitted). Indeed, the Court repeatedly has held that a federal court may correct constitutional wrongs in areas generally within the purview of state lawmakers, and it has applied this principle to the area of elections. In addition to *Baker*, *supra*, *see William v. Rhodes*, 393 U.S. 23, 28 (1968) ("[The state's] claim that the political-question doctrine precludes judicial consideration of these cases requires very little discussion. That claim has been rejected in cases of this kind numerous times."); *Bond v. Floyd*, 385 U.S. 116, 130 (1966) ("The State does not claim that it should be completely free of judicial review whenever it disqualifies an elected Representative; it admits that, if a State Legislature excluded a legislator on racial or other clearly unconstitutional grounds, the federal judiciary would be justified in testing the exclusion by federal constitutional standards."); *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are

conducted under the invalid plan."); *Wesberry v. Sanders,* 376 U.S. 1, 6-7 (1964) (noting that "nothing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction"); *Gomillion v. Lightfoot,* 364 U.S. 339, 344-45 (1960) (striking down municipal boundaries that impaired voting rights and concluding that "[l]egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution"). As we noted in *Judge II,* where state action (or, as here, inaction) infringes rights guaranteed by the federal Constitution, the federal courts have the power to hear cases and fashion remedies to redress the constitutional wrong.

B

Senator Burris next asserts that the district court usurped the constitutional role of the Illinois General Assembly when it decided how candidates should be selected for the special election and set a deadline for certifying election results. The phrase "as the legislature may direct," which concludes the second paragraph of the Seventeenth Amendment, U.S. CONST. amend. XVII, para. 2, affirms that the Amendment was not intended to disrupt the allocation of power established by the Elections Clause of the Constitution to dictate the terms of elections. *See*

U.S. CONST. art. I, § 4, cl. 1. *Judge I*, 612 F.3d at 552-54; *see also Newberry v. United States*, 256 U.S. 232, 252 (1921). Accordingly, "State law controls the timing and other procedural aspects of vacancy elections. The Elections Clause obliges the state to make these rules, and the final phrase of the Seventeenth Amendment's second paragraph reaffirms this role." *Judge I*, 612 F.3d at 554. Notwithstanding these authorities, Senator Burris maintains that the district court's order offends the Constitution.

As an initial matter, Senator Burris failed to raise this argument before the district court. And this argument, unlike the justiciability claim we discussed above, can be forfeited. A party who fails to present an argument in the trial court forfeits the position on appeal, unless we choose to entertain it "in the interests of justice." *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 391 (7th Cir. 2007). In this case, we see no reason to take this unusual step. In the district court, Senator Burris was perfectly content with the district court's power to fashion an order dictating what candidates would participate in the November 2 special election, so long as he was included among those candidates. He asked the district court to implement a signature-gathering mechanism that would allow him to earn a place on the ballot; and, when that idea failed, he encouraged the court to add him to the ballot by virtue of the fact that he was the temporary appointee. Not once in the five hearings before the injunction issued did Senator Burris argue that the district court lacked the authority to establish a slate

of candidates, and his written objections to the injunction, submitted on July 29, do not mention this point either. This court will not overturn an injunction based on an argument not presented to the district court, *Russian Media Group, LLC v. Cable America, Inc.*, 598 F.3d 302, 308-09 (7th Cir. 2010), and there is no good reason to make an exception in this case, where Senator Burris took a position in the lower court that is the opposite of the one he advances here.

Even if Senator Burris had not forfeited the argument, he would be no better off. Our previous discussion of the political-question doctrine amply demonstrates the power of the district court to fashion an equitable remedy in this case. In the face of a constitutional violation, it makes no difference that both the Elections Clause and the final phrase of the Seventeenth Amendment's second paragraph assign primary responsibility to the states for controlling the timing and other procedural aspects of vacancy elections. The same can be said of countless other areas in which, once a constitutional violation has been proven, federal courts have the power to issue remedial orders tailored to the scope of the constitutional violation. *See, e.g., American Trucking Ass'n, Inc. v. Smith,* 496 U.S. 167 (1990) (state taxation); *Hutto v. Finney,* 437 U.S. 678 (1978) (prison conditions); *Milliken v. Bradley,* 418 U.S. 717, 744-45 (1974) (school desegregation); *Swann v. Charlotte-Mecklenburg Bd. of Ed.,* 402 U.S. 1, 15 (1971) (school desegregation); *Brown v. Board of Education,* 349

U.S. 294, 299-300 (1955) (school desegregation). As Governor Quinn recently pointed out in his opposition to a stay of the district court's order in the Supreme Court, "Once the appellate court . . . determined that the Seventeenth Amendment required . . . an election, it was impossible to hold the election in the manner set forth by the Illinois legislature. In that circumstance, the district court was required to remedy the constitutional violation perceived by the Seventh Circuit, something that was unquestionably within the court's power." Memorandum of Governor Pat Quinn in Opposition at 16, *Burris v. Judge, et al.*, No. 10A272 (U.S. Sep. 17, 2010) (citing *Smith v. Robinson*, 468 U.S. 992, 1012 n.15 (1984)).

C

With respect to Senator Burris's final argument, we can be brief. Senator Burris contends that the district court's order, which was designed to remedy a violation of the Seventeenth Amendment, unconstitutionally blocks not only his access to the ballot but also that of any others who might be interested in running in the special election. In support of this argument, Senator Burris lists a number of cases where the Supreme Court has struck down ballot access restrictions as violating the Equal Protection Clause, the First Amendment guarantee of freedom of association, and the Qualifications Clause of Article I, Section 3. *See Williams v. Rhodes*, 393 U.S. 23 (1968), *Anderson v. Celebrezee*, 460 U.S. 780 (1983), and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 1995),

respectively. But apart from alleging generally that his exclusion from the November 2 special election violates the Constitution, Senator Burris gives no indication about which provisions of the Constitution he is relying on or how his exclusion has caused the violation. We have repeatedly reminded litigants, especially those represented by counsel, that compliance with Rule of Appellate Procedure 28 requires more than "a generalized assertion of error." *Anderson v. Hardman,* 241 F.3d 544, 545 (7th Cir. 2001); *see also Haxhiu v. Mukasey,* 519 F.3d 685, 691 (7th Cir. 2008). Senator Burris's claim that he has been unconstitutionally denied access to the ballot leaves us with very little to evaluate.

For the sake of completeness, however, we observe that the Supreme Court has explained that the effect of ballot access restrictions on candidates always has a correlative effect on the field of candidates among whom voters might choose. *Anderson,* 460 U.S. at 786. When analyzing candidate restrictions, we are "'to examine in a realistic light the extent and nature of their impact on voters.'" *Id.* (quoting *Bullock v. Carter,* 405 U.S. 133, 143 (1972)). For example, restrictions pose a problem if they keep political parties off the ballot, *Williams,* 393 U.S. at 31, interfere with political expression, *Illinois Elections Bd. v. Socialist Workers Party,* 440 U.S. 173, 186 (1979), or force indigent candidates to pay fees they cannot afford, *Lubin v. Panish,* 415 U.S. 709, 718 (1974).

At the same time, however, candidacy itself is not a fundamental right, and the Court has held "that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'" *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (quoting *Bullock*, 405 U.S. at 143). "[N]ot all restrictions imposed . . . on candidates' eligibility for the ballot impose constitutionally-suspect burdens on voters' rights to associate or to choose among candidates. . . . '[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.'" *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). In this case, two considerations lead us to the conclusion that the district court's order does not run afoul of the Court's guidance on ballot-access restrictions. First, nothing in the permanent injunction excludes a particular class or group of candidates in a manner that suggests that an identifiable group of voters will be left out of the special election. Second, and more importantly, the district court's order is narrowly tailored to address only one occasion; it will have no effect on future elections in Illinois.

As we have already noted, the district court drew on a procedure used in this circuit after *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970), to define the mechanics of the special election required by the Constitution. Senator Burris attempts to derive a constitutional violation from the district court's effort to

balance a constitutional requirement, state election law, and the need to supply a remedy in an expeditious fashion. But far from being an additional onstitutional error, the district court's effort did nothing more or less than vindicate constitutional rights in light of the real-word consequences of the necessary relief. *See Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982). The district court had discretion to limit the special election participants to names already on the general election ballot in order to avoid other problems, both constitutional and practical, that might have arisen if the special election were left wide open. *Cf. Nader v. Keith,* 385 F.3d 729 (7th Cir. 2004) (approving a district court's refusal to enter an injunction that would have interfered with an already-scheduled election). Finally, the district court's remedy, which relies on candidates selected pursuant to the Illinois Election Code, was designed to be, and probably is, the most democratic and constitutionally sound approach the district court could have devised.

III

Senator Burris has asked us to vacate the district court's permanent injunction on the ground that it is the job of the Illinois legislature, not the federal courts, to establish election procedures that ensure that the seat once held by President Obama in the U.S. Senate is filled in a manner that complies with the Seventeenth Amendment. Putting to one side

the fact that the plaintiffs brought suit to compel Governor Quinn and others to act when they refused to do so, Senator Burris now concedes that the consequence of granting him the relief he seeks is that no special election will take place at all in light of the complexity of the administrative steps needed to prepare for the election. He says this is normal, pointing to our observation in *Judge I* that nearly 15% of the almost 200 vacancies in the last century have been filed without a vote of the people. But this statistic provides no support for Senator Burris's position. To the contrary, it demonstrates that too often the requirements of the Seventeenth Amendment have been ignored. Well-established principles of equity require courts to consider, among other factors, the balance of hardship between plaintiff and defendant and the effect that the injunction would have on the public before granting equitable relief. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). In this case, the balance of hardships favors the plaintiffs, who – along with the rest of the citizens of Illinois – will see their Seventeenth Amendment rights vindicated in a special election. For Senator Burris, it means only that he will finish his temporary appointment in the Senate two months earlier than he may have expected. In an exceedingly short time, the district court considered the arguments of all sides, forged agreement between the parties, and reached a solution to bring the Illinois election machinery into line with the federal Constitution. The district court is to be congratulated for the fine job it

did, under extreme time pressure, in resolving this case.

The district court's order is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GERALD ANTHONY JUDGE, et al.,	)	Docket No. 09 C 1231
Plaintiffs,	)	
vs.	)	
PAT QUINN, et al.,	)	Chicago, Illinois June 23, 2010
Defendants.	)	2:15 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS – MOTION
BEFORE THE HONORABLE JOHN F. GRADY

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* * *

[10] want two elections. You just want the one that's going to take place on November 2nd for the 112th Congress.

MR. IOPPOLO: Judge, there will be massive – the avoidance of voter confusion is an extremely important state interest, always has been recognized as such. We are going to have two ballot positions.

The other candidates are not here. I know that – I don't know whether they need to be here, but, you know, we are going to have two ballot positions, one on top of the other. Voters are going to vote for what, the 60-day term first, then the 6-year term? How do we even know who the candidates are even going to be for the 60-day term?

THE COURT: That's one of the things you have to figure out.

MR. IOPPOLO: Maybe Senator Burris wants to run for the 60-day term. Maybe independents do. We have an elaborate election code that provides how that happens. We have to have a primary election typically before we decide who gets on a general election ballot. There is no way we can do that in six months before a general election. We can't just override the Illinois Election Code by fiat. We can't do that. We can't just decide who goes on the election.

In the case of Jackson v. Ogilvie, remember, that was an empty house of representatives seat. Here you have a filled senate seat, point one distinction.

[11] Point two, the Constitution does not treat the senate vacancies in the house the same way as it treats vacancies in the senate. The governor does not have any authority to make a temporary appointment of a house seat.

THE COURT: But neither did he have authority to appoint Senator Burris to the 112th Congress.

MR. IOPPOLO: He had – well –

MR. WRIGHT: Excuse me.

MR. IOPPOLO: Well, we contend that he did. He certainly did for the duration of the term. That's what Lynch says.

THE COURT: For the duration.

MR. IOPPOLO: That's what Valenti says.

THE COURT: What do you mean by the duration of the term?

MR. IOPPOLO: Until the next election, to fill out the Obama term because there would not be time to have a replacement. I mean, Burris came in in year four or five of the six-year term.

THE COURT: Let me say this. It's obvious that I disagree with counsel for the government.

MR. WRIGHT: May I speak, your Honor?

THE COURT: Hold on just a minute.

The Seventh Circuit opinion made a lot of sense to me. There are some things we have to do to fill in the gaps [12] that were intentionally left by the Seventh Circuit. But I think that what Judge Wood said is understandable and an appropriate way to proceed. However, it's obvious that the governor is going to move for reconsideration and it's going to raise some points that may well have substance. So there's no point, in my opinion, in our trying to do

anything today. What we should do is await the results of the motion for reconsideration. What do you think?

MR. WRIGHT: I agree, your Honor, and on behalf of Senator Burris, we strongly support the position of the Attorney General. We think it's the appropriate position. There are a number of courts still open with regard to the decision from the Seventh Circuit, and we think they need to be addressed.

THE COURT: My suggestion to you all is this. Since there's going to be at least one party moving for reconsideration who may not raise all of the issues that the three of you would want to raise, I am wondering whether there is a procedure whereby you can join in the motion and ask for the court to treat the particular issue that you think needs further study. I don't know whether there is a procedure that would accommodate that or not.

For instance, Senator Burris may have arguments that Mr. Ioppolo would not – the governor, in other words, would not present on a motion for reconsideration. It might be that

* * *

[25] Amendment cases. If you recall, in that case, what the state of Pennsylvania did is to say we're going to have an election in an odd number year and the candidates will be selected by the party committees, and the plaintiff in that case took the opposite position to our case. They said you're holding the

election too soon, you're depriving us of having a primary, and the Court of Appeals of the Third Circuit said there is no requirement for a primary to fill this special election. You can have the party committees do it, and I suspect that is what happened in 1970 here in Illinois, that the party committee somehow selected these candidates. I don't know that. I think we need to find out post haste, and we may be able to inform the court, here is a mechanism that works, not costly. There may be a mechanism, for example, for the party committees, and there are other parties, the Green Party and so forth, to each designate their nominee, presumably it would be the same, and a petition requirement for anybody else who wants to run, which is, you know, the way that we sometimes solve these problems. But I think the court is absolutely right that you can't let state logistics override the constitutional mandate.

MR. IOPPOLO: The Illinois Election Code is not – somehow we may have a false dichotomy that the Constitution is always going to trump the Illinois Election Code. No. We wield the Constitution ourselves. The Constitution itself [26] says that the conduct of elections is regulated by the states.

We have a state election code that's the size of a small phone book. We cannot just make this up as we go along. We cannot deprive people of the right to vote. If this 60-day term is important enough for the people to vote on, then the people have to do it right and we have to do it right. And normally, our definition of doing it right is we do the full nine yards of

what it means to run a primary election, a general election, we have to have – independents want to get on the ballot, and maybe people in the State of Illinois want to vote for one person for the 60-day term and a different person for the six-year term. So we don't want to have a sham election where it's the same people. Who decided that by fiat, that it should be exactly the same people?

THE COURT: On page 38 of the Seventh Circuit opinion, the court talks about this question of who will be on the ballot. And they say they are not addressing the question of whose name will be on the November 2 ballot for the Obama vacancy. Then here: The state might propose a solution acceptable to all parties; for example, using the candidates who have already qualified for the election to the 112th Congress. And here is the language that is involved in your arguments: So long as that solution complies with Illinois and federal law.

Well, of course, Mr. Ioppolo is saying that that

* * *